

January 31, 1990

Jane Doe¹

Dear Ms. Doe:

Re: Access to Records and Reports Maintained by the
Department of Human Services Concerning Alleged
Parental Child Abuse

This is in response to your request for an advisory opinion concerning whether records and reports maintained by the Department of Human Services ("DHS") regarding the alleged sexual abuse of your child must be made available for your inspection and copying.

ISSUE PRESENTED

Whether the Uniform Information Practices Act (Modified) ("UIPA"), chapter 92F, Hawaii Revised Statutes, requires that a parent be allowed to inspect records and reports maintained by the DHS relating to a report of suspected parental child abuse under chapter 350, Hawaii Revised Statutes.

¹ This person's identity is being kept confidential because of her status as an alleged child abuser and because chapter 350, Hawaii Revised Statutes, and 42 U.S.C. . 5106a(b)(4) (Supp. 1989) evidence an intention to protect the identity of parents who have been suspected of child abuse where no formal criminal or civil proceedings ensue. Release of her name, therefore, would constitute a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes.

BRIEF ANSWER

Under the UIPA and chapter 350, Hawaii Revised Statutes, a parent suspected of having abused his or her child has a limited right to inspect and copy records and reports relating to a child abuse investigation conducted by the DHS. The UIPA does not require an agency to disclose government records which are protected from disclosure by a statute of this State. Under section 350-1.4, Hawaii Revised Statutes, all records and reports of suspected child abuse are confidential, unless otherwise provided by DHS rules.

Chapter 920, title 17, Hawaii Administrative Rules, provides that the DHS may disclose records to the parent or legal guardian to whom the record "relates." The parent however, may not have access to records which violate the confidentiality of another parent, the child, a consultant, a complainant, or any other person. Although vague, we believe that under the DHS's regulations, and in the absence of a court order, a parent must be provided with access to all records relating to them which do not reveal information provided in confidence by the child, the complaint, and others, or reveal such persons' identities.

FACTS

Chapter 350, Hawaii Revised Statutes, requires certain health and child care providers to report any instance of suspected child abuse or the existence of a substantial risk that such abuse may occur in the reasonably foreseeable future. In April of 1988, based upon a report of suspected child abuse filed under section 350-1.1, Hawaii Revised Statutes, the DHS took temporary custody of your three year old daughter by authority granted to it by chapter 587, Hawaii Revised Statutes. During the period that the DHS took custody of your daughter, she was placed in an emergency shelter home. After investigating the report and conducting interviews with you, the child's father, your daughter, and others, the DHS returned your daughter to your custody without filing a petition under chapter 587, Hawaii Revised Statutes. In addition, no criminal charges resulted from the alleged incident. By letter dated June 27, 1988, the DHS notified you that the allegations of sexual abuse "had not been confirmed."

As a result of her temporary separation from her parents, you believe that your child has experienced "separation anxiety," and as a further result, is consulting a mental health

professional. You believe that your review of the DHS's records and reports would assist in understanding your child's continuing emotional difficulties. Accordingly, you requested access to the DHS's records to determine the substance of what was said about you and the child's father by DHS investigators, social workers, and witnesses. The DHS's case records contain investigative reports and logs, summaries of interviews, factual data concerning the parents and child, medical reports, correspondence, information concerning placement of the child in an emergency shelter home, and other data.

In response to this request, by letter dated September 20, 1989, the Director of Human Services notified you that DHS "would be more than willing to speak to [the child's] therapist" upon the receipt of an executed "Consent to the Release of Information" form.

You request an advisory opinion pursuant to section 92F-42(3), Hawaii Revised Statutes, concerning your right to inspect and copy records and reports maintained by DHS concerning the alleged abuse of your child.

DISCUSSION

Under the UIPA, "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. . 92F-11(a) (Supp. 1989). Further, section 92F-13, Hawaii Revised Statutes, provides in pertinent part:

This chapter shall not require disclosure of:

. . . .

- (4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure;

Pursuant to state law, child abuse records are granted a measure of protection. Section 350-1.4(a), Hawaii Revised Statutes, states:

Confidentiality. (a) All reports to the department concerning child abuse or neglect made pursuant to this chapter, as well as all records of such reports, are confidential. The director may

adopt rules, pursuant to chapter 91, to provide for the confidentiality of reports and records and for the authorized disclosure of reports and records. Any person who intentionally makes an unauthorized disclosure of a report or record of a report made to the department shall be guilty of a misdemeanor.
[Emphasis added.]

Under chapter 350, Hawaii Revised Statutes, "report" means "the initial oral statement and, if required by section 350-1.1(c), the subsequent written account concerning the facts and circumstances which cause a person to have reason to believe that child abuse or neglect has occurred or that there exists a substantial risk that child abuse or neglect may occur in the reasonably foreseeable future." Haw. Rev. Stat. . 350-1 (Supp. 1989).

The DHS receives federal funding under the Child Abuse Prevention and Treatment Act of 1974 ("Act"), as amended, 42 U.S.C. . 1506 (Supp. 1989), to carry out child abuse prevention and treatment programs. Among other things, the Act requires states receiving grants to have a child abuse and neglect reporting law, and "provide for methods to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians." 42 U.S.C. . 5106a(b)(1), (4) (Supp. 1989). Further, under 45 C.F.R. . 1340.14(i)(1) (1988), in order to qualify for a grant, each state must, by statute, provide that all records and reports of child abuse and neglect are confidential and that their unauthorized disclosure is a criminal offense. However, the regulations authorize states to disclose records and reports, under limitations the state determines, to:

A person about whom a report has been made, with protection for the identity of any person reporting known or suspected child abuse or neglect and any other person where the person or agency making the information available finds that disclosure of the information would be likely to endanger the life or safety of such person.

45 C.F.R. . 1340.14(i)(2)(viii) (1988) (emphasis added).

Pursuant to section 350-1.4, Hawaii Revised Statutes, the DHS has promulgated administrative regulations which permit the disclosure of child abuse records and reports to specific agencies and persons. With respect to parental access to child

abuse records, section 17-920.1-8(d), Hawaii Administrative Rules provides:

(d) Records may be released to a parent or legal guardian to whom the record relates. The parent or legal guardian may not have access to records which violate the confidentiality of another parent, the child, a consultant, a complainant, or any other person. [Emphasis added.]

Section 17-920.1-8(d), Hawaii Administrative Rules, does not provide any guidance concerning what records, if disclosed, would "violate the confidentiality of another parent, the child . . . a complainant, or any other person." As currently worded, the rule appears to give the DHS unfettered discretion to determine what records would violate the confidentiality of the child or other persons. On the other hand, the rule contemplates that a parent may inspect records which "relate" to them. In this vein, we note that several states provide by statute that a parent or person suspected of child abuse may inspect all records or reports prepared by agencies responsible for family or child protective services, with protection only for the identity of the abuse reporter.² See, e.g., Ala. Code . 26-14-8(8) (1986); Colo. Rev. Stat. . 19-3-314(2)(e) (Supp. 1988); Flor. Stat. Ann. . 415.51(2)(e) (1989); Ind. Stat. Ann. . 31-6-11-18(a)(7) (Burns 1984); Iowa Code Ann. . 235A.15(2)(a)(2), (4) (1989); Mich. Comp. Laws Ann. . 722.626(1)(f) (1989); Mo. Ann. Stat. . 210.150.1(3) (1989); Utah Code Ann. . 62A-4-514(1)(d) (1989); Wis. Stat. Ann. . 48.981(7)(a)(1) (1987).

Unlike Hawaii, these states have statutorily defined the persons and agencies that may inspect otherwise confidential child abuse records and reports. However, the Hawaii State Legislature, rather than define by statute the persons who may access such reports, has delegated to the DHS broad authority to make such determinations by rule.

Had the DHS merely intended to only protect the identity of the reporter, the child, or any other person, it could have done so. It would appear, however, that section 17-920.1-8(d),

² We note, however, that the federal government, as a condition of federal funding to child protective state agencies, does not require parental access to such records and reports.

Hawaii Administrative Rules, goes beyond protection of only the identity of such persons, and in addition, protects information which would otherwise violate their confidentiality. This conclusion is supported by the unambiguous language of section 350-1.4(a), Hawaii Revised Statutes, "all reports . . . as well as all records of such reports are confidential."

Absent legislative or regulatory clarification, we conclude that a parent may inspect and copy all government records maintained by the DHS that relate to them, after the DHS has deleted from such records and reports information that would identify the child, the reporter, or other persons, and information that would otherwise violate their confidentiality. Although the DHS's regulations may fairly be construed to protect only the identity of the child, the abuse reporter, or other persons, given the harm caused by child abuse and the usual reluctance to report such abuse, we feel constrained to interpret the regulations so as to encourage the reporting of alleged abuse. As the United States Supreme Court noted in a case involving a Pennsylvania statute making all child abuse records confidential (even to the parent) except by court order:

If the [child abuse] records were made available to [the alleged abuser,] even through counsel, it could have a seriously adverse effect on Pennsylvania's efforts to uncover and treat abuse. Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there are often no witnesses except the victim. A child's feeling of vulnerability and guilt, and his own unwillingness to come forward are particularly acute when the abuser is a parent. It is therefore essential that the child have a state-designated person to whom he may turn, and to do so with the assurance of confidentiality.

Pennsylvania v. Ritchie, 480 U.S. 39, 60, 107 S. Ct. 989, 1003, 94 L. Ed. 2d 40, 59 (1987).

Lastly, if in response to your records request under the UIPA, you believe that the DHS has failed to provide you with all information that relates to you after deleting information protected by rule or statute, you may commence an action in circuit court³ under section 92F-15, Hawaii Revised Statutes.

³ After the Office of Information Practices ("OIP") the promulgates administrative rules, an alternative appeal mechanism will exist pursuant to section 92F-15.5, Hawaii Revised Statutes. Under the statute, the OIP shall, upon request, review and rule an agency's denial of access to government records.

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After review of the records in camera under section 92F-15(b), Hawaii Revised Statutes, the court may determine for itself which records violate the confidentiality of the child, the complainant, or any other person.

CONCLUSION

The UIPA does not require an agency to disclose government records which are protected by a statute of this State. Section 350-1.4(a), Hawaii Revised Statutes, makes all records and reports concerning child abuse confidential, subject to administrative rules issued by the DHS concerning access.

In our opinion, the administrative rules promulgated by the DHS permit parents to inspect government records concerning a child abuse investigation which "relate" to them. However, as we construe the DHS's rules, the DHS is not required to disclose information which would identify the child, the complainant or others, or information which would otherwise violate such person's confidentiality.

Hugh R. Jones
Staff Attorney

HRJ:sc
cc: Honorable Winona E. Rubin
Director of Human Services

APPROVED:

Kathleen A. Callaghan
Director